IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zeila H. Barr, their guardian, *Appellants,* vs. THE TRAVELERS INSURANCE COMPANY, *Appellee.*	No. 10,728
ZEILA BARR, *Appellant,* vs. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Appellee.*	No. 10,729

(CONSOLIDATED CASES)

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANTS.

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Subject Index

Table of Authorities Cited

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REPLY BRIEF FOR APPELLANTS.

The appellees in these consolidated causes have filed separate briefs. Each of these is exceptionally well written, and, without being prolix, is a thorough discussion of the issues from the standpoint of the appellees. However, since the brief for the Travelers Insurance Company in No. 10,728, written by Mr. Leo

Friedman, argues each of the two points made in the brief of counsel for the other appellee, and presents some additional contentions, we hope that it will not be deemed a disparagement of the excellent work of counsel for the Equitable Life Assurance Society if we address our reply for the most part to the matters urged in Mr. Friedman's brief. The references hereinafter made, therefore, unless otherwise noted, will be to the brief for the appellee in No. 10,728. This method, we believe, will be more convenient and less repetitious than the answering of each brief separately.

THE CASES CITED BY APPELLEES DO NOT SUSTAIN THEIR CONTENTION THAT THE STATE PROCEDURAL LAW HAS NO APPLICATION AND THAT THE RULES PREVAILING IN CALIFORNIA ON MOTIONS FOR A NONSUIT DO NOT APPLY TO CASES REMOVED FROM THE STATE COURTS.

ON A MOTION FOR A NONSUIT THE STATE PRACTICE GOVERNS.

Contending in our opening brief that federal courts follow the state law in cases commenced in or removed to them because of diversity of citizenship, and that it was the duty of the trial judge, in passing upon the motions to dismiss for failure of proof, to follow the law of the State of California as to dismissals or nonsuits for failure of the plaintiff to prove his case, we cited a great number of California cases, which pronounced the well-settled rule that on such motions all the evidence in favor of the plaintiff must be taken as true, and that if the evidence is fairly susceptible

of two constructions, or if either of several inferences may reasonably be drawn from the evidence, the Court must take the view most favorable to the plaintiff. (Opening Brief for Appellants, pp. 34-40.)

Appellees do not question that this is the law in the State of California. It is argued, however, that a different rule prevails on motions to dismiss for failure of proof under Rule 41-b of the Federal Rules of Civil Procedure, and that a proceeding under said rule is not analogous to a motion for a nonsuit in the California Courts.

We submit that this contention is wholly untenable, for the following reasons:

(1) Under the federal statute, and the decisions construing the same, a nonsuit or directed verdict is governed by the state practice.

Section 724, Title 28, *U.S.C.A.*, reads,

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, **any rule of court to the contrary notwithstanding.**"

In numerous decisions, the federal Courts have held that, under this section, dismissal or nonsuit on motion of the defendant without the consent of the plaintiff, after the introduction of evidence, and the

effect thereof as a judgment on the merits, are governed by the state practice.

Central Transportation Company v. Pullman's Palace Car Co., 139 U.S. 24, 11 S.Ct. 478, 35 L. ed. 55;

Slocum v. N. Y. Life Ins. Co., 228 U.S. 364, 57 L. ed. 879, 33 S.Ct. 523;

Neil Bros. Grain Co. v. Hartford Fire Ins. Co. (C.C.A. 9), 1 Fed. (2d) 904;

Antocic v. Baltimore & Ohio R.R. Co., 47 Fed. (2d) 97;

Falvey v. Coats, 47 Fed. (2d) 856, 89 A.L.R. 1;

Bohenik v. Delaware & H. Co., 49 Fed. (2d) 722;

Clarke v. Order of United Commercial Travelers, 79 Fed. (2d) 564.

And a federal Court has no power to withdraw the case from the jury and enter judgment for the defendant "on the merits."

Neil Bros. Grain Co. v. Hartford Fire Ins. Co., supra;

F. W. Woolworth Co. v. Davis, 41 Fed. (2d) 342;

Blass v. Virgin Pine Lumber Co., 50 Fed. (2d) 29;

Ristucci v. Norfolk & W. R. Co., 60 Fed. (2d) 28.

The California Courts hold that the right of the Court to direct a verdict is governed by exactly the same principles as apply to a motion for a nonsuit.

Duggan v. Forderer, 79 Cal. App. 339, 249 Pac. 533;

Estate of Flood, 217 Cal. 763, 21 P. (2d) 579.

The rule in the State Courts as to the direction of a verdict applies in the Federal Courts.

Kennedy Lumber Co. v. Rickborn, 40 Fed. (2d) 228;

Colon v. Clyde S.S. Co., 52 Fed. (2d) 845;

Clarke v. Order of Com. Travelers, supra.

In *Central Transportation Co. v. Pullman's Palace Car Co.,* supra, the Supreme Court of the United States says:

> "The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant, is, as observed by Mr. Justice Field, delivering a recent opinion of this court, 'rather a matter of form than of substance, except that in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended unless a new trial be granted, either upon motion or upon appeal.' (*Oscanyan v. Winchester Repeating Arms Co.,* 103 U.S. 261, 264, 26 L. ed. 539, 541.)
>
> Whether a defendant in an action at law may present in the one form or in the other or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of 'practice, pleadings and forms and modes of proceeding,' as to which the courts of the United States are now required by

> the act of Congress of June 1, 1872, Chapter 255, to conform as near as may be to those existing in the courts of the state within which the trial is had."

In *Neil Bros. Grain Co. v. Hartford Fire Ins. Co.,* supra, Judge Rudkin of this Court quotes a Washington statute, identical with that of the statute of California (sec. 408, I *Rem. Comp. Stat.),* which read:

> "An action may be dismissed or a judgment of nonsuit entered. * * * By the court, upon motion of the defendant when, upon the trial, plaintiff fails to prove a sufficient case for the jury."

Citing *Slocum v. N. Y. Life Ins. Co.,* supra; *Central Transportation Co. v. Pullman's Palace Car Co.,* supra, and *Coughran v. Bigelow,* 164 U.S. 301, 17 S. Ct. 117, 41 L. ed. 442, he proceeds:

> "This section establishes a practice or mode of procedure which the federal courts are required to follow under the Conformity Act."

Counsel for the appellees apparently have overlooked the Conformity Act and the foregoing decisions when they argue that the trial court was not bound to follow the California procedure and the rules and principles laid down by the California courts as to motions for a nonsuit or a directed verdict.

In *Slocum v. New York Life Insurance Co.,* supra, it is clearly held that a federal court has no power to withdraw the case from the jury and enter judgment on the merits in favor of the defendants.

Young v. U. S., 11 Fed. (2d) 823, and *Gary Theatre Co. v. Columbia Pictures Corp.,* 120 Fed. (2d) 891, are cited by appellees in support of their statement that "A judgment of dismissal under rule 41(b) is to be affirmed on conflicting evidence when there is any substantial evidence to support findings in favor of defendants."

In *Young v. United States,* supra, the trial Court at the close of plaintiff's evidence granted a motion of the defendant "for a dismissal on the ground that the plaintiff had not produced sufficient evidence to show that 'he was suffering from pulmonary tuberculosis, active, or from any other disability which would make it impossible for him to engage in some gainful occupation.' "

The Court made a minute order reciting that the case had been heard on the merits and ordering judgment in favor of the defendant. The plaintiff thereafter moved the Court to vacate this order and the Court amended the order to read, "That the motion made by the defendant to dismiss plaintiff's complaint **on the ground that the plaintiff had failed to make a prima facie case** is sustained. The Court thereafter made findings of fact and conclusions of law and entered judgment in favor of the appellee. This Court, in an opinion by Judge Wilbur, uses the following language:

> "In presenting his appeal appellant stated that one question on appeal is whether or not there is substantial evidence to show that plaintiff became permanently and totally disabled on or before

September 20, 1929. He thus assumes one of the questions to be determined on appeal is whether or not there is sufficient evidence to require the submission of the case to a jury, had there been a jury. The appellant is in error in that regard for the judgment of the court was on the merits. The rules so provide. Rule 52(a) of the Federal Rules of Procedure, 28 U.S.C.A. following section 723c, requires that there shall be findings of fact and conclusions of law 'in all actions tried upon the facts without a jury'. Rule 41(b) provides for an involuntary dismissal of an action after plaintiff has completed the presentation of his evidence and defendant has moved for dismissal upon the ground that upon the facts and the law plaintiff has shown no right to relief. It is further provided that 'unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjurisdiction upon the merits.'

"These rules do away with the former distinction in California applicable in the federal courts sitting in California between a judgment of nonsuit and a judgment on the merits in all suits or actions where the court sits without a jury.

"In the case at bar from the two minute orders and the findings of fact and conclusions of law and judgment, it is clearly apparent that the court was of the opinion and decided that the appellant had not made out a prima facie case."

It is therefore apparent that all that the *Young* case really decides is that the judgment of the District

Court was proper because of the failure of the plaintiff to prove a *prima facie* case. This is so because, after using the language just quoted, the Court proceeds to review the evidence and to point out that the defendant actually had engaged in gainful occupations. To state the matter otherwise, an order granting a nonsuit would have been proper under the state practice. It is true that the Court at the conclusion of the opinion says:

> "Even if we assume that there was sufficient evidence to justify a finding in favor of the appellant, it can not be said that the finding in favor of the government was clearly erroneous where during a long period of time and at the very time when the policy expired the plaintiff was actually making a living by a gainful occupation and had done so for a number of years before that time, where it was not clearly established that this work imperiled his health or life."

This statement, together with that contained in the last paragraph heretofore quoted from the opinion, are clearly *obiter dicta* and not necessary to the decision. In any event, we submit that if *Young v. U. S.*, supra, is authority for the proposition that a federal Court, sitting in California, may, on a motion for a dismissal for failure of proof, weigh the evidence and find upon the facts, contrary to the state practice, it is to that extent erroneous and should be overruled or disapproved.

Gary Theatre Co. v. Columbia Pictures Corp., supra, was a suit in equity to enjoin the defendants'

practice in distributing motion picture films, charging violation of the Sherman Anti-trust Act. At the conclusion of the plaintiff's case, the Court, sustaining defendants' motion, entered judgment dismissing the complaint for want of equity. The trial Court entered special findings of fact as contemplated by Rule 52(a) of the Federal Rules of Civil Procedure. The Circuit Court of Appeals held that the evidence warranted the findings, and concludes by saying:

> "To determine the question in favor of plaintiff would necessitate the substitution of our judgment upon the facts for that of the trial court."

The case is easily distinguishable from the case at bar for the reasons, first that it was a proceeding in equity, and, second, that the Court made specific findings of fact, **which was not done in the case at bar.**

Moreover, the Court adverts to the well-settled rule that where one of two inferences may with equal propriety be drawn from the evidence, the plaintiff has failed to sustain the burden of proof. Unfortunately, the Court in its statement of this rule does not place upon it the limitation to which it is subject. Ordinarily on a motion for a nonsuit or a directed verdict, if the evidence is reasonably susceptible of two inferences, it is for the jury or for the Court sitting without a jury to say which of the two inferences shall prevail, and for the purposes of the motion every inference must be resolved favorably to the plaintiff (see cases cited in Opening Brief for Appellants, pp. 34-40). It is only where the evidence

and the effect thereof leave no possible room for difference of opinion in the minds of reasonable persons that the Court can say as a matter of law that it is insufficient to justify a verdict for the plaintiff. If the trial Court is of the opinion that a verdict for the plaintiff would be **against the weight of the evidence,** he may, after verdict, grant a new trial. Indeed, it is his duty to do so. But he may not grant a nonsuit or direct a verdict in favor of the defendant. These principles are so well settled in California that it would be an impeachment of the legal learning of this Court to cite further authorities in their support.

However, in actions where fraud is alleged,—and the gist of the action in *Gary Theatre Co. v. Columbia Pictures Corp.,* supra, was founded upon alleged fraudulent practice in violation of the anti-trust laws, —the courts have adopted a rule that is *sui generis.* In such cases it has been held that "if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing." (*Ryder v. Bamberger,* 172 Cal. 791, 799; *Raine v. Spreckels,* 54 Cal. App. (2d) 169, 173; *Estate of Bryson,* 191 Cal. 521, 540.) Accordingly, the decision of the Circuit Court of Appeals in *Gary Theatre Co. v. Columbia Pictures Corpn.,* supra, was fully justified, because there were two conflicting inferences which might with equal propriety have been drawn from the evidence, and, therefore, the presumptions that the law has been

obeyed and of innocence of criminality, fraud or unfair dealing, came of necessity to the aid of the defendant, and the *prima facie* evidence of fraud which the law requires was not made out.

THE TRIAL JUDGE TREATED THE MOTION AS A MOTION FOR A NONSUIT AND MADE NO FINDINGS OF FACT.

It is well to state in passing that it is obvious that the learned trial judge in the case at bar did not attempt to rule upon the weight of the evidence or the credibility of the witnesses, but merely took the position that, taking all of the evidence for the plaintiffs as true, the plaintiffs failed to make a *prima facie* case.

The trial judge made no findings of fact, as was done in *Young v. United States,* supra.

That we have not misconstrued the attitude of the trial judge is apparent from what was stated by him in granting the motion. At page 273 of the transcript on appeal, in No. 10,728, the learned trial judge says:

> "Gentlemen, if there were a **scintilla of evidence** in this matter, speaking colloquially of the rule that we used to learn about, I would favor the cause of the plaintiff here, because, after all, he paid for the insurance policy and should get the benefit of it. But despite my inclination in the matter and my opinions about it, after all, we have to be guided by the rules of law, and there is a burden of proof, Mr. Taaffe, that the plaintiff has to sustain. You have to have **some evidence** upon which the Court can find that there is a liability, or, at least, a prima facie case."

It is clear, therefore, that the trial judge took the position that there was not a scintilla of evidence to justify a finding for the appellants. That he treated the motion to dismiss as a motion for nonsuit is apparent, not only from this statement, but from the fact that he made no findings, as was done in *Young v. United States,* supra, and *Gary Theatre Co. v. Columbia Pictures Corp.,* supra.

SECTION 41(b) OF THE FEDERAL RULES OF PROCEDURE DOES NOT CONFER UPON A TRIAL JUDGE THE RIGHT TO PASS UPON THE EVIDENCE ON A MOTION FOR A DISMISSAL.

This must be true for three reasons:

1. Subdivision (b) of Section 41 does not by its terms apply only to cases tried by the Court without a jury. It obviously applies to all trials.

2. If the rule is given the construction contended for by learned counsel for the appellees, its inevitable result will be to confer upon every trial judge the power to take every cause from the jury, if, in his opinion, the evidence does not sustain a verdict for the plaintiff. He may substitute his own opinion of the evidence for that of the jury impaneled and sworn to try the cause, thus making the impanelment of a jury a mere hollow form. Under the plain provisions of the Constitution, this can not be done, First, because by the Seventh Amendment to the Constitution the right of trial by jury as at common law is preserved inviolate; Second, because by the provisions of Sec-

tion 723c, Title 18, U.S.C.A., by which alone the Supreme Court of the United States was empowered to make the rules of federal procedure, "the right of trial by jury as at common law and declared by the Seventh Amendment to the Canstitution shall be preserved to the parties inviolate."

3. It is submitted that Section 723c, U.S.C.A., does not repeal and was not intended to repeal Section 724 of Title 28, and was not intended to give to the Supreme Court the power by the adoption of rules to repeal existing statutes. Implied repeals are not favored by the courts. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis. The general policy of the law is adverse to repeal of statutes by implication. This doctrine has been enunciated so often that mere citation of the cases in which it has been expounded would, without quotation, occupy many pages.

59 *Corpus Juris* 905, and eight columns of decisions cited in the footnotes.

Moreover, if Section 723c U.S.C.A. confers upon the Supreme Court the power by the adoption of rules of procedure, to amend or repeal existing laws, the said statute is unconstitutional as a delegation of legislative power to the judicial branch of the government.

The legislature can not delegate or confer legislative power on the courts or impose legislative duties

upon them, because such duties are not judicial in nature. The power of courts to make such rules as they deem necessary is subject to the limitation that such rules must not contravene a statute or the organic law.

Johnson v. Manhattan Ry. Co., 289 U. S. 479, 53 S. Ct. 721, 77 L. ed. 1331;

In re Hein, 166 U. S. 432, 17 S. Ct. 624, 41 L. ed. 1066;

Washington-Southern Navigation Co. v. Baltimore & P. S. B. Co., 263 U. S. 629, 44 S. Ct. 220, 68 L. ed. 480.

As against conflicting statutory provisions, such rules are without force.

General Electric v. Marvel Rare Metals Co., 287 U. S. 430, 53 S. Ct. 202, 77 L. ed. 498.

They must be subordinate to the law, and, in case of conflict, the law will prevail.

Ewing v. United States, 244 U. S. 1, 37 S. Ct. 494, 61 L. ed. 955;

Federal Land Bank v. Crombie, 259 Ky. 389, 80 S. W. (2d) 39.

This is fundamentally true when the conflict is with the organic law, or with a substantial right at common law, or under a statute; and it is ordinarily held to be true when the conflict is with a statute regulating procedure.

Alaska Packers Assn. v. Pillsbury, 301 U. S. 174, 57 S. Ct. 682, 81 L. ed. 988;

Johnson v. Manhattan Ry. Co., supra;

Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 29 S. Ct. 324, 53 L. ed. 675;
Ward v. Chamberlain, 2 Black 430, 17 L. ed. 319.

This limitation also applies when the rule-making power is exercised under statutory authority.

Concord Casualty & S. Co. v. United States, 69 Fed. (2d) 78;
Ward v. Chamberlain, supra;
People v. Metropolitan Surety Co., 164 Cal. 174, 128 Pac. 324.

It is obvious that the rule in question deals, not with a mere matter of procedure, but with rules of evidence and the effect thereof, and that therefore its validity can not be sustained, because a rule of court can not interfere with or control the rules of evidence.

Mills v. Bank of United States, 11 Wheaton 431, 6 L. ed. 512;
Doe v. Winn, 5 Peters 233, 8 L. ed. 108;
Roberts v. White, 32 R. I. 185, 78 Atl. 497.

We submit, therefore, that, if Rule 41(b) bears the construction given it by *Young v. U. S.,* supra, it is invalid, because it attempts to repeal or abrogate the conformity act passed by Congress for the purpose of preserving the rights of citizens of the state in the federal tribunals which function within their territorial limits.

Lastly, we submit that, even if this Court should feel impelled to follow *Young v. United States, supra,* nevertheless the judgment must be reversed for the

failure of the District Court to make findings as required by Rule 52(a) of the Federal Rules of Procedure.

UNDER THE EVIDENCE PLAINTIFFS WERE ENTITLED TO A JUDGMENT IN EACH CASE.

This contention was fully discussed with copious excerpts from the testimony, and with citation of many authorities, in the Opening Brief for Appellants, pages 6-32 and 41-57.

Counsel have summarized their argument as to the alleged insufficiency of the evidence in the following language:

> "Under the facts in the instant case, appellants. in order to establish such accidental means, had to prove that the insured was bitten by an infected tick, that such bite infected insured with spotted fever, which in turn was the predisposing cause of the pneumonia from which the insured died."
>
> (Brief for Appellee The Travelers Insurance Co., p. 26.)

In other words, according to learned counsel, it would have been necessary to have produced a witness who saw the tick bite the deceased, to have captured what counsel with sarcasm not entirely commendable in a case of this character refers to as "the guilty tick," to have had a bacteriological examination made of the tick, and to have seen the process of an infection going on in the body of the deceased before his fatal illness

developed. There are two conclusive answers to this somewhat naive argument: first, that an examination of the tick would have revealed nothing, because the tick, which is a vector or carrier of the infection, is not itself infected, any more than a typhoid-carrier is suffering from typhoid fever; and, second, that to observe the process of incubation taking place in the bloodstream of the deceased while he was still alive would have been an impossibility. Counsel are loud in their wail that a post-mortem examination of certain specimens of the lung tissue did not positively reveal the existence of **rickettsia**. This is a matter of no moment, because the testimony given by the medical gentlemen quoted in the opening brief shows that at the time the examinations were made the body had been embalmed, and that, moreover, a person may die of Rocky Mountain Spotted Fever and **rickettsia** be absent, where the onset of the disease is so sudden as in the case at bar.

CONCLUSION.

We repeat that no reasonable conclusion could be drawn from the evidence other than that the deceased came to his death from a violent and accidental cause; to-wit: the bite of a tick which produced Rocky Mountain Spotted Fever resulting in pneumonia, which was the terminal cause of death; indeed, no other possible cause of death was suggested by learned counsel, either in their cross-examination of witnesses at the trial, or in their briefs. The situation

presented is that of a man of robust physique and in the best of health. He went on a hunting trip and was bitten by a tick of a species which is a notorious vector of Rocky Mountain Spotted Fever; a checkup by a physician on the day following his return showed him to be in the best of health; the next day he complained of illness and went supperless to bed; the following morning he developed a violent fever, talked incoherently, and that night lapsed into unconsciousness. The next day he was dead, in spite of all that medical science could do for him. His symptoms were those of Rocky Mountain Spotted Fever, and there is not even a "scintilla" of evidence that his death was produced by anything else than the tick bite. Courts have upheld recovery for death from accidental causes on far weaker evidence. See

Omberg v. United States Mutual Accident Assn., 101 Ky. 303, 40 S. W. 909;

McAuley v. Casualty Co. of America, 39 Mont. 185, 102 P. 586;

North Wildwood v. Cirelli, 29 N. J. L. 302,

and other cases cited in appellant's opening brief, notably the case of

Reinoehl v. Hamacher Pole and Lumber Co. (Idaho), 6 Pac. (2d) 806,

in which the facts are indistinguishable from those in the case at bar.

These consolidated cases present another instance of the all-to-common practice of insurance companies "welshing" on the payment of policies for which they

have accepted premiums, often over a long period of years.

It is submitted that on the proven facts, if no other evidence had been taken, it would have been the duty of the trial Court to have found for the plaintiff, because the rule is well settled, that uncontradicted and unimpeached testimony can not be arbitrarily disregarded. See the elaborate discussion of this subject by Justice Sutherland of the Supreme Court of the United States in

Chesapeake & Ohio R.R. v. Martin, 518 S. Ct. 453, 283 U. S. 209, 75 L. ed. 983.

For these reasons, it is respectfully submitted that the judgment of the lower Court should be reversed, and the cause remanded to the District Court for a new trial.

Dated, San Francisco,
March 19, 1945.

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